

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02-07-2007

CORAM:u

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CRIMINAL APPEAL Nos.1072/2004 & 371/ 2005

1.Sakthivel

2.Rathi @ Suresh Kumar

..Appellants in/Accused 1 to 2
Crl.A.No.1072/2004/A2 & A4

Kalimuthu

..Appellant in
Crl.A.No.371/2005 /A3

-vs-

State by the Inspector of Police
R-3, Madukarai Police Station
Coimbatore
(Crime No.559 of 2001)

.. Respondent in
both appeals/Complainant

These appeals are filed against the Judgment made in
Spl.S.C.No.47/2003 dated 27.07.2004 on the file of the Court of learned
Special Judge/ Principal Sessions Judge,Coimbatore.

For appellants : Mr.K.V.Shanmuganathan-A1 and A2
(Crl.A.No.1072/2004)

(Crl.A.No.371/2005): Mr.P.M.Duraiswamy-A3

For respondent : Mr.V.R.Balasubramaniam,
Additional Public Prosecutor.

COMMON JUDGMENT

These appeals have been preferred against the Judgment in
Spl.S.C.No.47 of 2003 on the file of the learned Special Judge(Principal
Sessions Judge) Coimbatore. A1 to A3 who have charged under Section 376
(2)(g) of IPC who have been convicted and sentenced to undergo ten years
rigorous imprisonment and a fine of Rs.10,000/- each, are the appellants
herein (Crl.A.No.1072 of 2004 by A1 and A2. Crl.A.No.371 of 2005 by A3).

2. The short facts of the prosecution case relevant for the purpose
of deciding these appeals sans irrelevant particulars are as follows:

P.W.1 the victim herein is a sweeper in a private company and while she was on her way to the workspot near the place of occurrence, A1 to A3 waylaid P.W.1 Tulsi pushed her towards nearby maize field belonging to one Senthil Gounder and committed an offence of gang rape. She immediately rushed to the near by Mahaliamman Temple from where she got a saree from P.W.8 and returned home with the help of an elderly persons and since it was late in the night, and her husband was also not in the house at that time, the following day, she went and informed the occurrence to the President of Co-operative Society and according to his instructions, a complaint was drafted with the help of the son of Panchayat Board President and presented before the Madukarai Police Station on the next day ie., on 28.12.2001 at about 3.00p.m. Ex P1 is the complaint. P.W.10, the then Sub Inspector of Police, Madukarai Police Station, has registered the case under Crime No.559 of 2001 under Section 376 of IPC r/w 3(i)(iii) and 3(1)(xii) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, on the basis of the Complaint Ex P1 preferred by P.W.1. Ex P15 is the first information report. The copies of the same have been sent to the Judicial Magistrate as well as the police higher officials.

3. Taking cognizance of the offence, the learned Judicial Magistrate No.VII, Coimbatore has issued summons to the accused, and on their appearance, furnished copies under Section 207 of Cr.P.C. since the case is exclusively triable by the Court of Sessions, the learned Judicial Magistrate has committed the case to the Court of Sessions. On appearance of the accused before the Sessions Court, the learned Sessions Judge has framed charge under Sections 3(i)(iii) and 3(i)(xii) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and also under Section 376(2)(g) of IPC and when questioned, the accused pleaded not guilty.

4. On the side of the Prosecution, P.Ws 1 to 12 were examined. Exs P1 to P32 were exhibited. M.O.1 to 6 were marked.

5. P.W.1 is the victim girl Tulsi who would depose that she is aged 24 and is working in a private radiator company as a sweeper and that A1 and A2 belongs to Okkiliar Caste and A3 belongs to Scheduled Caste to which she also belongs and that on the date of occurrence, while she was going to work place A1 to A3 way laid her and dragged her to the maize field belonging to one Senthil Gounder and after removing her saree and inskirt and torn her jacket A1 to A3 have forcibly raped her and that she ran away from the place of occurrence to the nearby Mahaliamman Temple within half an hour in a nude posture and at that time, poojas were performed in the said Mahaliamman Temple, on hearing her call a lady by name Dhanapackiam brought a towel from the priest of the temple and also gave water to her and at the instance of Dhanapackiam, Chandran a tailor brought a saree for her and that she had narrated what had happened to her, to Dhanapackiam, temple priest and also to Chandran. She would further depose that A1 and A2 followed her to the temple and she identified both of them to the people present in the temple in a scooter that they are

the persons who have raped her and that since it became dark, she returned to her house with the help of an elderly person and after her husband came to the house, she went and met the President of the Cooperative Society who in turn had advised her to complain with the President of Pichanur Panchayat. Accordingly, she went to the President of Pichanur Panchayat and narrated the instance who in turn had instructed her to prefer a complaint to the police and he asked his younger son to prepare a complaint and accordingly his younger son prepared a complaint which was shown to her and she has signed in the complaint, after going through the same and on the following day, she went to the police station in the evening and preferred a complaint which is Ex P1. The distance between the place of occurrence and Madukarai Police Station is about 10 km . The police had sent her to Government Hospital, Coimbatore for treatment. Since there was no doctor available in the evening, she returned to her house and on the next day morning , she went to the hospital. She had handed over to the police M.O.1 Nylon Jacket, M.O.2 green colour inskirt, M.O.3 saree which she wore at the time of occurrence.

5a. P.W.2 is the doctor who had examined A1 to A3 and issued Exs P2 to P4 potency certificate. P.W.3 is the Tahsildar who had issued community certificate to P.W.1 and A1 to A3 under Exs P5 to P8 respectively. P.W.4 would depose that M.O.1 Jacket was seized by the police in his presence under Ex P9 mahazar at the hospital on 28.12.2001 at about 06.00p.m.,

5b. P.W.5 is Suseela who runs a tea shop near Mahaliamman Temple. She would say that Dhanapackiam, received a towel from the temple priest and from her, she came to know that the towel is required for a woman who is standing near the temple without any saree and that she along with Dhanapackiam went and saw the said lady who was wearing only torn jacket and a towel. Chandran, a tailor gave a saree to the said lady through Dhanapackiam and after wearing the said saree, the lady Tulsi came to her tea shop and also informed her (P.W.5) that three persons have raped her and at that time , two persons came in a moped who were identified by Tulsi as the person who had raped her. She has also identified A1 and A2 as the person who were riding on the moped on the said date. She would further depose that temple priest Velusamy is now no more.

5c. P.W.6 is the doctor who had examined P.W.1 on 29.12.2001 and issued Ex P10 copy of the accident register. The doctor has opined that P.W1 had already undergone tubectomy and that nail marks were seen on her right hand and that she is not a virgin. The doctor has further deposed before the Court that P.W.1 has informed her that her inskirt, saree which was worn by her at the time of occurrence were taken away by three persons who had gang raped her.

5d. P.W.11 is the then Inspector of Police who had given Ex P16 requisition to the Government Hospital, Madukarai for examining P.W.1. Ex

P18 is the radiologist's report for fixing the age of the victim girl P.W.1. Through Ex P17, the victim girl was sent to the Government Hospital for examination.

5e. P.W.12 is the then Deputy Superintendent of Police, Pothanur Division, Coimbatore. After hearing about the registration of the case, under Crime NO.559 of 2001 of Madukarai Police Station under Section 376 (2)(g) of IPC, he immediately rushed to the Government Hospital, Coimbatore and examined P.W.1 and had recovered M.O.1 Jacket, in the presence of witnesses under Ex P9 mahazar and thereafter he went to the place of occurrence and prepared Ex P11 Observation Mahazar, at about 8.30p.m. On 28.12.2001 in the presence of P.W.7 and also recovered M.O.4 series a pair of chappels under Ex P12 Mahazar in the presence of P.W.7. M.O.5 series are the photo's and negatives for the place of occurrence taken through the photographer. He (P.W.12) has examined witnesses and recorded their statements. Ex P19 is the rough sketch prepared by P.W.12. On 30.12.2001 at about 12.15p.m., he had arrested the accused and recorded the confession statement of A1 in the presence of P.W.7 and another witness. Ex P 13 is the admissible portion of the confession statement of A1. On the basis of the admissible portion of the confession statement, A1, took him to a bush behind the compound wall of Pichanur radiator company and took out M.O.2 inskirt and M.O.3 saree worn by the victim girl at the time of occurrence, from the hidden place, which were seized under Ex P4 mahazar in the presence of P.W.7 and another witness. He had sent the accused for chemical examination along with Ex P21 requisition letter. M.O.6 TVS moped used by the accused was recovered on 2.1.2002 from the house of one Gurusamy and Manickam under Ex P22. Blood samples were taken from P.W.1 and sent for chemical analysis. Ex P23 is the special report submitted by the radiologist. Through Ex P24, letter of requisition the material objects connected with this case were sent to forensic science laboratory for analysis. Ex P26 is the requisition letter given by the Court. Ex P27 is the chemical analyst's report. Exs P28 and P29 are the serologists' report. Under Ex P30 letter of requisition, the material objects connected with this case were sent to chemical laboratory for analysis. Ex P31 is the analyst's report.

5f. P.W.8 Chandran would depose that on information from Dhanapackiam, he gave a saree to P.W.1 on 27.12.2001 at about 4.30p.m., when she was found near the Mahaliamma Temple. P.W.8 has also deposed that P.W.1 has identified two persons who came in a moped at the time, as the persons who had raped her. He has identified as A1 and A2 are the persons who came on the other day in the moped and identified by P.W.1. He has further stated that P.W.1 had informed him that three persons have raped her.

5g. P.W.9 would depose that A1 took his moped some 2 ½ years back at 11.00a.m., and on the same day night, he returned the moped. After completing investigation, P.W.12 has filed his final report against the accused.

6. When incriminating circumstances under Section 313 Cr.P.C. were put to the accused, they would deny their complicity with the crime. They were examined one Senthil Gounder as D.W.1.

7. After going through the materials available on record before the trial Court by the prosecution including the oral and documentary evidence, the learned trial Judge has come to a conclusion that the offence constituted under Section 3(1)(i) and 3(1)(xii) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, has not been made out against the accused by the prosecution beyond any reasonable doubt and accordingly acquitted A1 to A3. But the learned trial Judge has convicted the accused under Section 376(2)(g) of IPC and sentenced them to undergo ten years rigorous imprisonment each with default sentence. Aggrieved by the findings of the learned Sessions Judge, A1 and A2 have preferred Crl.A.No.1072 of 2004 and A3 has preferred Crl.A.No.371 of 2005.

8. Now the point for consideration in these appeals are whether the case of the prosecution has been proved beyond any reasonable doubt to sustain the conviction against A1 to A3 under Section 376(2)(g) of IPC?

9..Heard Mr.K.V .Shanmuganathan, learned counsel appearing for the appellants in Crl.A.No.1072 of 2004 and Mr.P.M.Duraisamy, learned counsel appearing for the appellant in Crl.A.No.371 of 2005 and Mr.V.R.Balasubramaniam, learned Additional Public Prosecutor for respondent and carefully considered their rival submissions.

10. The occurrence as per P.W.1 victim girl has occurred on 27.12.2001 at about 4.30p.m., Even though ,P.W.1 has not specifically stated the time and date of occurrence, the Doctor P.W.6 who had examined her on 29.12.2001 had deposed that P.W1 had informed her that she was gang raped on 27.12.2001 at 4.00p.m., But Ex P1 complaint was preferred by P.W.1 with Madukarai Police Station only on 28.12.2001 at about 3.30p.m., So there is a delay of about 11 1/2 hours in preferring the First Information Report. The explanation given for the delay by P.W.1 is that after the occurrence, she ran away from the place of occurrence to nearby Mahaliyamman Temple from where she was given a towel through one Dhanapackiam and also a saree from P.W.8, Chandran and that she returned to her house with an elderly person and that since her husband was not in the house , she waited there and after her husband returned she went to President of Cooperative Society and informed about the occurrence who in turn had advised her to go to the President of the Panchayat Union, Pichanur and accordingly she went there and with the help of his younger son, (D.W.1) a complaint was prepared and read over to her and she signed the same and on the next day ie., on 28.12.2001, she went to the police station and preferred a complaint. So according to her evidence, the complaint was preferred and got ready on the night of the date of occurrence itself. But it is in the evidence of P.W.1 itself that the distance between Madukarai Police Station and the Pichanur where Ex P1 was prepared is only 10 k.m. But she has prepared the complaint only on

28.12.2001 at about 3.30p.m., in the evening. There is no explanation given by P.W.1 as to why she has not preferred the complaint with the help of police in the morning of 28.12.2001.

11. The learned Additional Public Prosecutor relying on State of Punjab -vs- Gurmit Singh and others(1996 CrI.L.J.1728) and contended that in sexual offences delay in the lodging of the FIR is immaterial if the delay is properly explained. In that case, the victim was aged 16 years, admittedly an unmarried girl and the occurrence had taken place while the victim was studying in X standard in the Government High School, Pakhowal. At that time, matriculation examinations were going on and the examination centre of the prosecutrix was located in the Boys High School, Pakhowal. On 30th March 1984 at about 12.30p.m after taking her test in Geography, the prosecutrix was going to the house of her maternal uncle, Darshan Singh and when she had covered a distance of about 100 karmas from the school, a blue ambassador car being driven by a Sikh youth aged 20/25 years came from behind. In that car Gurmit Singh, Jagjit Singh alias Bawa and Ranjit Singh accused were sitting. The car stopped near her Ranjit Singh accused came out of the car and caught hold of the prosecutrix from her arm and pushed her inside the car. Accused Jagjit Singh alias Bawa put his hand on the mouth of the prosecutrix. while Gurmit Singh accused threatened the prosecutrix that in case if she raise an alarm she would be done to death. All the three accused drove her to the tubewell of Ranjit Singh accused. She was taken to the kotha of the tubewell. The driver of the car after leaving the prosecutrix and the three accused persons then went away with the car. In the said kotha, Gurmit Singh compelled the prosecutrix to take liquor, misrepresenting to her that it was juice. Her refusal did not have any effect and she reluctantly consumed the liquor. Thereafter the accused one after another have raped the unfortunate victim. Next day morning at about 6.00 a.m., the accused took the girl in the same car and left her near the Boys High School, Pakhowal where she had been abducted. The victim girl had to take her examination in the subject of Hygiene on that date, She, after taking her examination in Hygiene, reached her village Nangal Kalam at about noon time and narrated the entire story to her mother Smt.Gurdev Kaur. P.W.7. Her father Trilok Singh P.w.6 was not present in the house at that time. He returned from his work late in the evening, to whom the mother of the victim girl narrated the episode to her husband. Thereafter, the victim's father contacted Sarpanch Joginder Singh of the Village. A Panchayat was convened. Matter was brought to the notice of the sarpanch of Village Pakhowal also. Both the Sarpanches tried to affect a compromise on 1-4.1984 but since the panchayat could not give any fruit or relief to the prosecutrix, she along with her father proceeded to the police station, and preferred the complaint. So for an occurrence which had taken place on 30.3.1984, the complaint was preferred only on 2.4.1984. But taking into consideration, the explanation offered by P.W.1, the complainant, facts and circumstances of the said case, it was held by the Honourable Apex court as follows:

" In sexual offences delay in lodging of the FIR can be due to variety of reasons particularly the

reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. Even if there is some delay in lodging FIR in respect of offence of rape, if it is properly explained and the explanation is natural in the facts and circumstances of the case, such delay would not matter."

12. But in the case on hand, it is in evidence that soon after the occurrence P.W.1 ran away from the place of occurrence to nearby Mahaliyamman Temple and narrated the occurrence to the temple priest, Dhanapackiam and P.W.8 Chandran. But Dhanapackiam was not examined in this case who according to the prosecution had offered the towel to P.W.1 and she is the person who met P.W.1 soon after the occurrence at first.

13. Yet another fact which glares at the case of the prosecution is that according to P.W.1, the complaint was preferred at Pichanur with the help of the younger son of the President of Pichanur Panchayat Union. Even though, the person who prepared Ex P1 complaint was not examined on the side of the prosecution, he was examined as defence witness as D.W.1. D.W.1 in his evidence disowned to have prepared Ex P1 complaint as narrated by P.W.1. In the cross examination, P.W.1 would deny the suggestion that since P.W.1 has refused to the Panchayat decision, he is supporting the accused. The natural conduct of the victim like in this case is to inform the police as early as possible and to prefer a complaint. From the evidence of P.W.1, it is seen that due deliberation has been made with Panchayat President, Cooperative Presideint of Pichanur, and thereafter only the belated complaint has been preferred. It is in evidence that P.W.1 has identified A1 and A2 who came in the moped when she was taking asylum at the Mahaliyamman Temple and she has also identified A1 and A2 to Dhanapackiam, Temple Priest as well as P.W.8 Chandran. P.W.1 would categorically depose that A1 and A2 have followed her. He would further admit that it was a full moon day and there was some poojas were performed in the temple and there was seven or eight persons present in the temple. But no one has taken any steps to apprehend A1 and A2 near the temple itself, after both of them were identified by P.W.1.

14. The prosecution relies on the recovery under Section 27 of the Evidence Act. According to P.W.12, M.O.3 saree, M.O.2 in skirt which were worn by the victim girl at the time of occurrence were recovered from A1 on the basis of the confession. But P.W.1 in her cross examination has identified M.O.3 saree as the one given to her in the temple. Even P.W.1 in her evidence in the chief examination itself would depose that M.O.1 Jacket M.O.2 in skirt and M.O.3 saree were handed over by her to the police in the presence of P.W.4 Paramasivam. So under such circumstances, the recovery of Inskirt M.O.2 and M.O.3 saree from A1 on his confession falls to the ground. A1 to A3 were arrested on 30.12.2001 itself by P.W.12. But no wearing apparels of the accused like dhothi, underwears and

banian were recovered from the accused by the police. The unexplained delay in preferring the complaint in this case , in my opinion, cuts at the root of the prosecution case. Under such circumstances, it cannot be said that the prosecution has proved the guilt of the accused under Section 376(2)(g) of IPC beyond any reasonable doubt to warrant conviction. The point is answered accordingly.

15. In fine, the appeals are allowed and conviction and sentence under Section 376(2)(g) 109 of IPC awarded by the learned Special Judge (Principal Sessions Judge) ,Coimbatore in S.C.No.47 of 2003 on the file of learned Special Judge(Principal Sessions Judge) Coimbatore is set aside and the accused/appellants are set at liberty forthwith, if they are not required in any other case. Bail bond executed by the appellants shall stand cancelled. Fine if paid shall be refunded to the accused.

sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

sg

To

1. The Special Judge(Principal Sessions Judge) Coimbatore.
2. The Superintendent of Central Prison, Coimbatore.
3. The Public Prosecutor, High Court, Madras
- 4.The Inspector of Police,R-3 Madukarai Police Station, Coimbatore.

1 cc to Mr.K.V.Shanmuganathan Advocate SR.NO.39766
1 cc to Mr.P.M.Duraiswamy Advocate SR.NO.39547

MJ(co)
RD 25.7.07

Cr1.A.Nos.1072/2004
and 371/2005

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